

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 15, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP1758-CR**

**Cir. Ct. No. 2013CF331**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KOU THAO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Marathon County: MICHAEL MORAN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kou Thao appeals a judgment of conviction for, among other things, second-degree intentional homicide. He also appeals an order denying his postconviction motion for resentencing. Thao contends the State breached its plea agreement with him by refusing at the sentencing hearing to concede the historical facts regarding Thao's claimed use of imperfect self-defense during the fatal shooting for which he was prosecuted.

¶2 We conclude that even assuming the State breached the plea agreement, the breach was not material and substantial. The primary benefit Thao received from the plea agreement was a reduction in the available penalty as a result of the State's agreement to reduce the charge from first-degree intentional homicide. Further, the agreement specifically allowed the State to argue for the maximum penalty on the reduced charge, and the agreement did not contain any specific directive regarding the effect of the statutory concession on the parties' sentencing arguments. Consequently, we affirm.

## **BACKGROUND**

¶3 On April 17, 2013, Wausau police received a report from an individual that Thao had shot Tong Hang in a residential basement. The individual told police that several days prior he heard a gunshot come from the basement, where Thao was drinking with another man. The individual did not witness the shooting, but he described going into the basement, seeing a body and blood on the floor, and helping Thao wrap the body in a tarp and load it into a car. Following Thao's arrest, police discovered the victim's head in the trunk of the

car, and, based upon information Thao provided, they later discovered the other body parts in a Milwaukee residence.<sup>1</sup>

¶4 Thao and Hang were alone together in the basement at the time of the shooting; Thao is the only surviving witness to the events that preceded Hang's death. During testimony at a motion hearing, Thao asserted he and Hang had been drinking that day and had gotten into an argument about underage girls while driving to the residence where the murder occurred. Thao claimed Hang had placed a knife against his neck during the argument, and Thao promised there would be underage girls where they were going in an effort to calm Hang. When they arrived at the residence, Hang became angry that there were no underage girls present, and he threatened to beat up Thao and rape his wife. Thao testified that upon hearing this, he drew a gun he was carrying and shot Hang in the head as Hang started to move toward him.

¶5 Thao was charged with three crimes: first-degree intentional homicide; hiding a corpse as a repeater; and possession of a firearm by a felon as a repeater. Pursuant to a plea agreement, the State filed an Amended Information reducing the intentional homicide charge to a second-degree offense and removing the repeater penalty enhancers from the other two offenses. Thao pled no contest to the second-degree intentional homicide charge and guilty to the other two offenses. The parties were free to argue the appropriate sentences. The maximum

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<sup>1</sup> Thao initially denied killing Hang to police. After his arrest, Thao admitted he killed Hang, but he claimed he did it because Hang was a child molester.

penalty for second-degree intentional homicide is sixty years<sup>2</sup>; the other offenses are each punishable by up to ten years' imprisonment.<sup>3</sup>

¶6 The State's amendment to the intentional homicide count triggered a statutory concession regarding the State's ability to disprove the existence of mitigating circumstances regarding the crime. A person is guilty of first-degree intentional homicide whenever he or she intentionally causes the death of another human being. *See* WIS. STAT. § 940.01(1)(a). However, the first-degree murder statute sets forth a number of affirmative defenses that mitigate the crime to a second-degree offense.<sup>4</sup> *See* WIS. STAT. § 940.01(2). When the existence of an affirmative defense has been placed in issue by the trial evidence, the State bears the burden of proving beyond a reasonable doubt that the facts constituting the claimed defense did not exist. *See* WIS. STAT. § 940.01(3). However, by charging a second-degree offense, the State, by statute, concedes "that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist." WIS. STAT. § 940.05(1)(b).

¶7 The operation of these statutory provisions was a source of controversy at the sentencing hearing. Based on Thao's criminal history and character, as well as the nature of his crimes, the State argued the maximum penalty was appropriate for each offense. The defense asserted the maximum

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<sup>2</sup> *See* WIS. STAT. §§ 939.50(3)(b) (2015-16); 940.05(1) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

<sup>3</sup> *See* WIS. STAT. §§ 939.50(3)(g); 940.11(2) (2013-14); 941.29(2)(a) (2013-14).

<sup>4</sup> The mitigating circumstance implicated in this case fell under WIS. STAT. § 940.01(2)(b), which provides: "*Unnecessary defensive force*. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable."

sentences were inappropriate because they would be equivalent to a life term for then twenty-eight-year-old Thao, and Thao would therefore receive no benefit from pleading to the reduced charge. Defense counsel also argued that Thao's version of what occurred in the basement was "unrefuted" by the State, and that by charging Thao with second-degree intentional homicide, the State had conceded that "some type of self-defense issue is intertwined in this case."

¶8 Following the allocution, and prior to the circuit court's sentence pronouncement, the prosecutor interjected to clarify what he deemed "misleading" comments by defense counsel in addressing the nature of the State's concession. The following exchange occurred:

[Prosecutor]: Okay. With all due respect to [defense counsel], and he is certainly worthy of a lot of respect, the comment that was made about the state making a concession that it couldn't prove what happened, and therefore we conceded to change the charge to second-degree intentional homicide, is misleading.

You know from your background, [and defense counsel] knows, that there are many reasons that plea agreements happen. Sometimes a witness can't be found. The facts are there. The facts are solid, but a witness is missing. Sometimes you speak to the family. The family doesn't want to go through the pain and suffering of a prolonged jury trial and concessions get made that don't deal with the proof or lack of proof.

The comment about there is an unrefuted statement about what happened between those two is actually not true. It's self-refuted by the defendant in his five or six statements.

So I don't want to make a big deal about this, but I don't want the court to be misled that the state was making a concession based on any facts rather than conceding that the family didn't want to go through a prolonged jury trial.

Defense counsel responded that the State had, by statute, made a concession regarding its inability to disprove that mitigating circumstances were present. The

court ultimately sentenced Thao to the maximum on the second-degree intentional homicide charge.<sup>5</sup>

¶9 Thao filed a motion for a new sentencing hearing. He asserted the prosecutor’s comments at the sentencing hearing constituted a material and substantial breach of the plea agreement. Thao argued he “did not expect the State to indicate this was a first degree intentional homicide case, and then ask for the maximum penalty.” The State responded that Thao received the benefit of the reduced charge and penalty, and the plea agreement specifically left the State free to argue for a sentence up to the maximum penalty. The State asserted the statutory concession did not require it to adopt Thao’s version of the facts for purposes of sentencing. The circuit court denied Thao’s motion following a hearing, and he now appeals.

## DISCUSSION

¶10 “Once a plea agreement has been reached and a plea made, a defendant’s due process rights require the bargain be fulfilled.” *State v. Deilke*, 2004 WI 104, ¶11, 274 Wis. 2d 595, 682 N.W.2d 945. It does not matter whether the circuit court was actually influenced by the State’s alleged breach, nor does it matter whether the court chose to ignore the State’s sentencing recommendation. *State v. Bowers*, 2005 WI App 72, ¶8, 280 Wis. 2d 534, 696 N.W.2d 255.

¶11 However, “[n]ot all conduct that deviates from the precise terms of a plea agreement constitutes a breach that warrants a remedy.” *Deilke*, 274 Wis. 2d

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<sup>5</sup> Thao was also given the maximum sentences on the other charges, but they were made concurrent to his sentence for intentional homicide.

595, ¶13. A defendant is not entitled to relief when the breach is merely technical. *Bowers*, 280 Wis. 2d 534, ¶9. Rather, the defendant bears the burden of showing, by clear and convincing evidence, that the State breached the agreement and that the breach was material and substantial. *Deilke*, 274 Wis. 2d 595, ¶13. A “material and substantial” breach of a plea agreement is one that “violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained.” *Bowers*, 280 Wis. 2d 534, ¶9.

¶12 The terms of a plea agreement and the historical facts regarding the State’s conduct that allegedly constitute a breach of the plea agreement are questions of fact. *State v. Bokenyi*, 2014 WI 61, ¶37, 355 Wis. 2d 28, 848 N.W.2d 759. We review a circuit court’s factual findings using the “clearly erroneous” standard. *Id.* However, we independently determine whether the State’s conduct constitutes a material and substantial breach of the plea agreement. *Id.*, ¶38.

¶13 In this case, the historical facts regarding the State’s alleged breach are not in dispute. Thao claims the State breached the plea agreement by its attempt to clarify at the sentencing hearing the precise nature of the State’s statutory concession. Thao asserts the breach occurred because the State, at the sentencing hearing, “did not concede it could not prove beyond a reasonable doubt that there were facts to justify a first degree intentional homicide” charge. According to Thao, this breach was material and substantial because the State’s agreement to charge second-degree intentional homicide should have “handcuffed the State’s arms in how effective it could be in arguing for a maximum sentence.” Thao asserts that by claiming it had reduced the charge to spare the victim’s family a trial, the State undermined the defense’s sentencing argument, and the

State was able to effectively argue that Thao “should get the maximum penalty since his conduct was more severe than what he was charged for.”

¶14 Assuming without deciding the State breached the plea agreement with its comments during sentencing, we conclude the breach was not material and substantial. As the circuit court recognized, the most significant benefit Thao derived from the agreement was the reduction in the charge from first-degree intentional homicide and the corresponding unavailability of a mandatory lifetime sentence. It is undisputed Thao benefited from this reduced exposure, as he was only eligible to be sentenced to a maximum of sixty years on the amended second-degree intentional homicide charge.

¶15 Moreover, courts draw upon contract principles in determining the rights of the parties to a plea agreement and whether there has been a breach that is material and substantial. *See Deilke*, 274 Wis. 2d 595, ¶12. It does not appear the parties had a meeting of the minds regarding the effect of the WIS. STAT. § 940.05(1)(b) statutory concession, including on the parties’ sentencing arguments. Thao’s attorney apparently believed the statutory concession could be used to Thao’s benefit at the sentencing hearing because it effectively established the facts underlying Thao’s imperfect self-defense theory. Presumably, defense counsel believed such mitigating facts would garner favor for Thao in terms of the court’s sentencing. The State, however, believed the concession only concerned its ability to meet its burden of proof regarding mitigating circumstances; indeed, the only witness to the events in question other than Thao was deceased, leading defense counsel to label Thao’s latest version of events “unrefuted.” The State contends it was not required to accept the factual merit of Thao’s theory of his defense.



¶16 In light of the considerable benefit Thao received as a result of the degree reduction on the homicide charge, this highly technical disagreement regarding the statute's proper effect (conceding facts versus conceding that a party cannot beyond a reasonable doubt disprove those facts) could not have been material and substantial to Thao. He never memorialized an agreement with the State as to the effect of the statutory concession for purposes of sentencing. Instead, it is undisputed the parties were free to argue at sentencing, which permitted the State to argue the maximum penalty was appropriate on the homicide charge.

¶17 Thao objects that he was effectively given a life sentence as a result of the circuit court ordering forty years' initial confinement. But the plea deal he reached with the State not only allowed this result, it did not place any explicit limitations upon the State's ability to argue for that exact sentence. Under these circumstances, even if Thao correctly believed the plea agreement required the State to concede the historical facts as he understood them, he has not shown by clear and convincing evidence that the State's refusal to do so was a material and substantial breach of the plea agreement in light of the parties' clear intent to allow the State to argue for the maximum sentence.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

